STATE OF MICHIGAN

COURT OF APPEALS

NATHAN & NATHAN, P.C.,

Plaintiff-Appellee/Cross-Appellant,

v

KENNETH MITAN and KEITH MITAN,

Defendants-Appellants/Cross-Appellees,

and

MITAN FINANCE DIVISION and MITAN PROPERTIES COMPANY, VI,

Defendants.

UNPUBLISHED
March 19, 1999

No. 201696
Oakland Circuit Court
LC No. 95-500641 CK

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Before this Court is an action to enforce a guaranty agreement, which ensured the payment of attorney's fees for a bankrupt company, executed by two individuals who had a financial interest in the company. Following a bench trial, the trial court entered judgment for plaintiff and awarded $24,298.35 plus costs and interest. The individual defendants were determined to be solely liable based upon their signatures on the guaranty agreement. Defendants[1] appeal as of right. Plaintiff filed a cross-appeal asserting that the trial court abused its discretion in failing to award it attorney fees pursuant to MCR 2.405. We affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

Defendants argue that the trial court improperly deprived them of their right to a jury trial with regard to the written guaranty. According to defendants, questions of fact existed concerning the validity of the alleged written guaranty, the terms and extent of the written guaranty, and whether the written guaranty was limited or unlimited. Whether a party is entitled to a jury is a question of law, which is reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998);

Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991).

Under ordinary contract principles, if the language of a contract is clear and unambiguous, its construction is a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). The initial question whether contract language is ambiguous is a question of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher, supra* at 722. Here, the trial court determined that the guaranty agreement was unambiguous. We conclude that the parties' guaranty agreement clearly established that defendants were individually liable for the payment of plaintiff's fees.[2] Therefore, any interpretation of the guaranty agreement was a question of law for the trial court.

Furthermore, defendants argue that there was a question of fact for the jury with regard to damages. We consider this issue waived. At the proceeding below, the trial court stated that it would be determining the construction of the written guaranty in a bench trial because the issue presented a legal question for the court. Thereafter, defense counsel explicitly inquired whether the trial court would be determining the issue of damages in the bench trial. When the trial court responded affirmatively, defense counsel replied: "Thank you, your Honor." Defense counsel's implied acquiescence and failure to object to the bench trial have waived this issue on appeal. *Phinney v Perlmutter*, 222 Mich App 513, 559; 564 NW2d 532 (1997); see, also, *People v Gonzalez*, 197 Mich App 385, 402-403; 496 NW2d 312 (1992).

Next, defendants assert that the trial court erred by calculating interest pursuant to MCL 600.6013(5); MSA 27A.6013(5). We disagree. On appeal, this Court reviews de novo the award of prejudgment interest pursuant to MCL 600.6013; MSA 27A.6013. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 623-624; 550 NW2d 580 (1996).

MCL 600.6013(5); MSA 27A.6013(5) provides:

> For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

The statute entitles a prevailing party in a civil action concerning a written instrument to an interest award from the date the complaint was filed until the date of satisfaction of the judgment. See *Beach, supra* at 624. In *Yaldo v North Pointe Ins Co*, 457 Mich 341, 350; 578 NW2d 274 (1998), our Supreme Court concluded that the trial court and this Court properly applied MCL 600.6013(5); MSA 27A.6013(5) because the parties' insurance policy was a "written instrument" as described under the statute. In affirming the lower courts' award of twelve percent interest on the judgment pursuant to

§ 6013(5), the Supreme Court stated that the term "written instrument" was "clear and unambiguous." *Id.* at 350.

According to defendants, MCL 600.6013(5); MSA 27A.6013(5) is only applicable if the judgment rendered has the effect of enforcing the payment of a sum certain detailed in a written promise. Because the instant case does not involve a guaranty for a sum certain, defendants assert that the trial court should have used MCL 600.6013(6); MSA 27A.6013(6) to calculate the interest. MCL 600.6013(6); MSA 27A.6013(6) states:

> Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs. However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid shall be retained by the plaintiff, and not paid to the plaintiff's attorney.

Here, defendants signed a document personally guaranteeing payment of attorney fees resulting from plaintiff's representation of Sci-Tel. The guaranty was a contract. Defendants agreed to be personally liable for Sci-Tel's attorney's fees in exchange for plaintiff's continued representation of Sci-Tel. Because judgment was rendered pursuant to the parties' written guaranty agreement, MCL 600.6013(5); MSA 27A.6013(5) was properly applied to calculate an interest award. The statute does not require that the written instrument contain a sum certain. In *Yaldo*, the Court applied MCL 600.6013(5); MSA 27A.6013 in an insurance contract case, despite the fact that a sum certain was not stated in the written instrument. Just as the exact amount of any potential damage or claim is not ascertainable at the time parties enter into agreements to provide insurance coverage, the exact amount of plaintiff's attorney fees, which included future representation, could not have been determined at the time the guaranty was executed. Because the guaranty was a "written instrument," the trial court properly applied MCL 600.6013(5); MSA 27A.6013(5) and determined that the proper interest rate was twelve percent, despite the fact that the parties' written instrument failed to contain a sum certain.

On cross-appeal, plaintiff argued that the trial court abused its discretion by refusing to award sanctions, including attorney fees, pursuant to MCR 2.405(E). We agree. The trial court's decision to award or deny sanctions is reviewed for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 177-178; 568 NW2d 365 (1997); *J C Bldg Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996).

Here, defendants made an offer of judgment in favor of plaintiff for $12,000 including interest, costs, and attorney fees. In response, plaintiff made a counteroffer of judgment against defendants jointly and severally for $23,500. Defendants rejected plaintiff's counteroffer. Pursuant to MCR 2.405(A)(3), the average offer was $17,750. Because plaintiff made a counteroffer and because the

adjusted verdict of $28,766.34 was more favorable to plaintiff than the parties' average offer, $17,750, plaintiff was entitled to recover actual costs under MCR 2.405(D)(2).

Prior to their offer of judgment, defendants rejected a mediation award of $19,000 by failing to respond. Plaintiff also rejected the mediation evaluation. Obviously, the adjusted verdict of $28,766.34 was not more favorable to defendants than the mediation award of $19,000. Additionally, the adjusted verdict was more favorable to plaintiff than the mediation award. Because the adjusted verdict was ten percent greater than the mediation evaluation, or in excess of $20,900, plaintiff was entitled to costs pursuant to MCR 2.403(O)(1). See MCR 2.403(O)(3).

When a party is entitled to recovery under either rule, as a mediation sanction or as a sanction in an offer of judgment scenario, a determination must be made regarding which court rule to apply in order to assess actual costs. MCR 2.405(E)[3] provides:

> **Relationship to Mediation.** In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

Plaintiff argues that it was entitled to actual costs under MCR 2.405(D)(2) and MCR 2.403(O)(1). Pursuant to MCR 2.405(E), plaintiff asserts that it was entitled to recovery of actual costs, including attorney fees, calculated from the date of defendants' rejection of the mediation award. However, the trial court's order, denying plaintiff's recovery of actual costs, failed to offer any reason why the interest of justice would not be served by an award of costs.

Here, because defendants rejected both a mediation award and an offer of judgment pursuant to MCR 2.403 and MCR 2.405, we must look to MCR 2.405(E) to determine which rule to apply in the instant case. *J C Bldg, supra.* Generally, the cost provisions of the court rule governing the later rejection control. *Id.* However, since plaintiff would be entitled to costs under both rules, costs may be recovered from the date of the earlier rejection. Because plaintiff was entitled to recover attorney's fees and costs pursuant to MCR 2.403(O)(1), calculated from the date that defendants rejected the mediation award, MCR 2.405(E), we believe that the trial court abused its discretion by failing to award plaintiff costs and fees without articulating the rationale behind its decision.

Although defendants argue that plaintiff is not entitled to sanctions because plaintiff was not the "prevailing party," we conclude that defendants' contention lacks merit. First, defendants cite no authority to substantiate their argument that plaintiff was not the prevailing party under the circumstances of this case. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). In any event, the record clearly indicates that defendants and defendant corporations filed a joint offer of judgment to plaintiff, were treated jointly throughout the case, and were represented jointly by the same attorney who filed joint pleadings. Under these circumstances, it is appropriate to aggregate the verdict and, in this case, award sanctions. *J C Bldg, supra* at 424-427. Further, contrary to defendants' argument, "it was necessary for plaintiff to prevail only on one theory in order to be considered a

prevailing party." See *Van Zanten v H VanderLaan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993).

We affirm in part, reverse in part, and remand for a determination of sanctions. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

[1] Hereinafter, "defendants" will refer to appellants Kenneth Mitan and Keith Mitan only.

[2] After reviewing the supplemental briefs submitted by the parties after oral argument and the Michigan Rules of Professional Conduct (MRPC), we also conclude that no violations of the MRPC occurred as a result of plaintiff requesting that defendants sign the written guaranty.

[3] It should be noted that MCR 2.405 was amended on October 1, 1997. However, because the request for sanctions arose in 1996-1997, this Court used the 1996 version of the Michigan Rules of Court. MCR 2.405(E) currently states: "Costs may not be awarded under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous."